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Testimony
Before the Committee on Resources
United States House of Representatives

Hearing Regarding Off-Reservation Gaming
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Mr Chairman and Members of the House Resources Committee, thank you for the opportunity to offer testimony on behalf of the Greenville Rancheria of Maidu Indians regarding the issue of off-reservation gaming, and to comment on the draft bill that you have circulated for comment.

There has been much said about this issue, by both tribes seeking to protect their economic turf and non-Indian communities seeking to block tribal economic development, but there has been shamefully little dialogue on this issue that is based on a thorough understanding of the law. Most of what has been said on the subject has come in the form of deliberate misinformation designed to give the appearance of a crisis where none actually exists. As a restored tribe that is virtually landless and seeking to acquire land through the restored land exception to section 20 of the Indian Gaming Regulatory Act (IGRA), we have a keen interest in this subject. I hope my testimony will cast some rational light on a debate that has been for too long conducted on the basis of misinformation, fear and greed.

As you know, there are four exceptions to section 20's general prohibition against gaming on off-reservation lands acquired after October 17, 1988, the date IGRA was signed into law. They are: (1) the two-part determination under section 20(b)(1)(A); (2) the settlement of a land claim under section 20(b)(1)(B)(i); (3) the initial reservation of a tribe recognized by the Secretary pursuant to 25 C.F.R. Part 83, under section 20(b)(1)(B)(ii); and (4) the restoration of lands to a tribe that was restored to federal recognition, pursuant to section 20(b)(1)(B)(iii). As we demonstrate below, each of these means for acquiring off-reservation land for gaming purposes has both procedural and substantive safeguards built into them to protect the legitimate interests of both other tribes and non-Indian communities.

THE TWO-PART DETERMINATION

With regard to the two-part determination under section 20(b)(1)(A), off-reservation land cannot be acquired in trust for either Class II or Class III gaming purposes unless the governor of the state in which the land is located concurs in the decision of the Secretary of the Interior that gaming on the off-reservation land proposed for acquisition is (1) in the best interest of the tribe, and (2) not detrimental to the surrounding community. In reaching this two-part determination, the Secretary must consult with state and local officials, as well as officials from other nearby Indian tribes.[1] Assuming that the Secretary reaches the conclusion that gaming on the proposed site will not be detrimental to the surrounding community, there is simply no chance that off-reservation gaming will

[1]Two-part determinations are generally accompanied by application to acquire the land in trust under 25 C.F.R. Part 151, which process is explained in greater detail in the next section. Whether or not accopanied by such an application, a two-part determination application will require compliance with the National Environmental Policy Act (NEPA), which provides the state, local governments, and other persons and groups in the area to comment on the proposed acquisition.

be approved under section 20(b)(1)(A) if the governor does not concur with the Secretary's finding, and it is extremely unlikely that the governor will concur if the local community is opposed.

Furthermore, section 20 of IGRA does not establish any standard for the governor's concurrence, and a governor is free to withhold concurrence for any reason or no reason. *See* Lac Courte Oreilles Band of Lake Superior Chippewas v. United States, 367 F.3d 650, 656 and 662 (7th Cir. 2004) (land cannot be acquired for gaming purposes under section 20(b)(1)(A) unless and until a governor responds to the Secretary's request for a concurrence, and the governor can willfully ignore such request); Confederate Bands of Siletz Indians v. United States, 841 F. Supp. 1479, 1486 (D.C. Oregon), affirmed on other grounds 110. F.3d 688, 697 (9th Cir. 1997), *certiorari denied* 522 U.S. 1027 (1997)("[t]he Governor, by doing nothing, can defeat the DOI's determination in favor of granting a tribe's application for an exception to § 2719(a).") There is virtually no chance that gaming will occur under this exception if the local community and the governor of the respective state do not both support the Tribe's application.

Nearby Indian tribes are also consulted as part of the two-part determination process. Although IGRA was not intended to protect tribes from competition from other tribes, Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 947 (7th Cir. 2000), it would be appropriate for Interior to consider credible information that the proposed new gaming will have a crippling impact on existing tribal gaming operations. Section 20 (b)(1)(A) adequately provides fo the protection of the legitimate interests of existing gaming operations.

THE SETTLEMENT OF A LAND CLAIM

The settlement of a land claim under section 20(b)(1)(B)(i) generally requires the approval of Congress pursuant to 25 U.S.C. § 177[2], so no gaming can occur under this exception unless

[2]Section 177 provides in pertinent part that:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Congress has approved the acquisition of the land in the legislation that settles the tribe's land claim. The need for the enactment of legislation by Congress provides a chance for everyone to be heard, including the state through its delegation,[3] and the community involved through its Senators and Congressional representative. Congress has a full opportunity to weigh the pros and cons of a particular land claim settlement and the propriety of gaming on land acquired through the settlement. This is an eminently fair and balanced process, and leaves little room for complaint outside of the "sour grapes" whining of those who didn't get their way.

THE INITIAL RESERVATION OF A NEWLY RECOGNIZED TRIBE

Tribe's recently recognized by the Secretary pursuant to 25 C.F.R. Part 83 are generally landless at the time of recognition. In order to engage in gaming, a newly recognized tribe will have to have lands acquired in trust for it by the Secretary of the Interior pursuant to section 5 of the Indian Reorganization Act (IRA)(25 U.S.C. § 465), and 25 C.F.R. Part 151. Under the Part 151 regulations, the Secretary must consider the following factors:

(1) the applicant tribe's need for the land (25 C.F.R. § 151.10(b);

(2) the impact on the state and local governments of removing the land from the tax rolls (25 C.F.R. § 151.10 (e)); and

(3) jurisdictional problems and potential conflicts of land use that may arise if the land is taken into trust (25 C.F.R. § 151.10 (f).

For off-reservation acquisitions,[4] the Secretary must also consider the distance of the land from tribe's reservation under § 151.11 (b), and the applicant tribe must also submit a business plan showing the anticipated economic benefits to the tribe as required by § 151.11 (c)

The state and the local government with jurisdiction over the land proposed for trust acquisition receive notice of the proposed acquisition from the Bureau of Indian Affairs (BIA), and they are afforded an opportunity to provide comments to the BI A. 25 C.F.R. § 151.10. Compliance with NEPA is also required. 25 C.F.R. § 151.10(h). Finally, judicial review of the Secretary's decision regarding a specific trust acquisition is available under the Administrative Procedures Act

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[3]Because most land claims under 25 U.S.C. § 177 involve illegal purchases of tribal land by state governments, most land claim settlements are achieved by Congressional ratification of an agreement between the state and the tribe whose lands were illegal purchased. Therefore, it is at least highly unlikely that a land claim settlement bill can be passed over the objections of state.

[4]All trust land acquisitions for a landless tribe are, by definition, off-reservation acquisitions.

(APA), and the Secretary's decision can be overturned by a court if it is found to be arbitrary and capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. § 706.

If land is successfully acquired in trust for a newly recognized tribe, the next step is for the Secretary to issue a proclamation proclaiming the land to be a reservation under 25 U.S.C. § 467. The acquisition in trust and the reservation proclamation together qualify the land as the tribe's initial reservation. A newly recognized tribe may avoid the general prohibition of section 20 of IGRA only with regard to those trust lands that are the subject of the Secretary's first reservation proclamation – the tribe's "initial reservation." *(See* memoranda dated December 13, 2000, from the Acting Associate Solicitor for Indian Affairs to the Regional Director of the BIA's Midwest Regional Office about the designation of lands as the initial reservation for the Huron Potawatomi Band in Michigan ("Huron Potawatomi Memorandum"). Moreover, Interior generally requires a tribe to show that it has historic and contemporary ties to land before it will designate land as the initial reservation of a newly recognized tribe. *See* the Huron Potawatomi Memorandum.

In short, there is a lengthy process for the acquisition of trust land and the declaration of that land as initial reservation that affords the state and impacted local government(s) and land owners an opportunity for input. Interior has established a substantive standard that requires that the tribe have both historic and contemporary ties to the land in order for it to be declared as the tribe's initial reservation. Finally, the Secretary's decision is reviewable in the federal courts. Once again, we have a fair and balanced process with both procedural and substantive safeguards.

THE RESTORATION OF LAND TO A TRIBE THAT IS RESTORED TO FEDERAL RECOGNITION

Restored tribes are also likely to be landless because their land was distributed in fee to tribal members at the time of termination, or sold to non-Indians, or both. Much of the land that was distributed to members was lost through tax sales and by other means. That is certainly what happened to the Greenville Rancheria, as well as to many of the other Rancherias terminated under the California Rancheria Act. 72 Stat. 69 (1958).

Like a newly recognized tribe, in order to engage in gaming, a restored tribe will have to have lands acquired in trust for it by the Secretary under section 5 of the IRA and the regulations at 25 C.F.R. Part 151, including the notice and comment procedures, and the consideration of the substantive regulatory criteria regarding taxes, land use, and jurisdictional conflicts.

As to the determination of whether the land proposed for acquisition can be considered restored, the federal courts require a tribe to show historic and contemporary ties to the land in order for it to qualify as land restored to a tribe that has been restored to federal recognition. *See* Grand Traverse Band v. United States, 198 F. Supp. 2d 920, 929-30 (W.D. Mich. 2002); Grand Traverse Band v. United States, 46 F. Supp. 2d 689, 698 (W.D. Mich. 1999); and Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155 (D.D.C. 2000). Interior also requires the showing of such a nexus. *(See* Memorandum of December 5, 2001 from the Associate

Solicitor-Indian Affairs to the Assistant Secretary-Indian Affairs regarding the Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians.) The National Indian Gaming Commission (NIGC) is no exception. *(See* the August 31, 2001 letter from Kevin K. Washburn, NIGC General Counsel to Judge Hillman of the Federal District for the Western District of Michigan regarding the Grand Traverse Band's Turtle Creek Casino; the August 5, 2002 decision of the NIGC regarding the Rohnerville Rancheria; the March 14, 2003, decision of the NIGC regarding the Mechoopda Indian Tribe of the Chico Rancheria; and the September 10, 2004 decision of the NIGC regarding the Wyandotte Nation. (The Interior and NIGC opinions are available at www.nigc.gov./resources/Indian Land Determinations.) Once again, both procedural and substantive safeguards prevent the abuse of the exception designed to allow restored tribes to avail themselves of the intended benefits of tribal governmental gaming under IGRA.

COMMENTS ON DISCUSSION DRAFT

We offer the following comments with regard to the Discussion Draft, which would amend section 20(b)(1) in several important ways significant to restored and newly recognized tribes. First, it would require the Secretary to determine that the lands to be acquired in trust "are lands within the state where the Indian tribe has its primary geographic, social, and historical nexus to the land." As demonstrated above, Interior and the NIGC already require that a tribe have historic and contemporary ties to land in order for that land to either be designated as a newly recognized tribe's initial reservation, or considered restored lands to a restored tribe.

Proposed new section 20(b)(1)(B)(ii) requires the Secretary to determine that the proposed gaming activity is in the best interest of the tribe and its members, and that it would not be detrimental to the surrounding community. We object to this new subsection on several grounds. First, we do not think that the Secretary of the Interior is in a better position than our Tribal Council to determine what is in the best interests of our Tribe or our members. Second, both of these considerations are already addressed through the Secretary's consideration of the tribe's application to have the land acquired in trust under 25 C.F.R. Part 151. The factors the Secretary considers under 25 C.F.R. §§ 151.10(e) & (f) already require the Secretary to consider impacts on the state and local government, and 25 C.F.R. § 151.11(c) already requires the Secretary to consider the expected benefits to the tribe.

Finally, we believe that proposed new section 20(b)(1)(B)(iii) is completely inappropriate because it requires the approval of the state as well as every unit of general purpose local government that has jurisdiction over the land or that is contiguous to it. Remember that restored and newly recognized tribes are generally landless and seeking their first and likely only chance to avail themselves of the benefits of governmental gaming under IGRA. As discussed above, a restored or newly acknowledged tribe must show that it has historic and contemporary ties to the land it wishes to acquire for gaming purposes. States and local governments simply should not have veto power over Indian self-determination and economic development. The enactment of such a provision would constitute a major abandonment of the United States' historic trust responsibility to protect tribal self-government from encroachments by state and local governments.

With regard to the Indian Economic Opportunity Zones proposed in the new section 20(e), we do not understand the purpose of proposed sections (e)(2)(B)(i) and (ii). The former restricts the practical ability of a tribe to choose another tribe as its manager because it limits the management fee to ten (10) percent. This seems to us an unfair limitation on potential tribal managers given that non-tribal managers can receive up to forty (40) percent of net revenues as a management fee. Section (e)(2)(B)(i) means that a tribe that needs an investment partner will have to do business with a non-Indian investor. We can see no reason to restrict the economic choices of tribes needing management or investment assistance, or of tribes who may choose to invest their wealth to help other tribes.

Also, we can see no purpose in limiting eligibility to tribes that have no ownership interest in another tribal gaming facility. It should not be assumed that because a tribe already has a casino, it is rolling in money. Most tribal casinos are modest and do not generate enough revenues to enable tribal governments to meet more than a century of unmet needs. The opportunity to participate in gaming in an Indian Economic Opportunity Zone may afford a tribe an opportunity to supplement the modest income it receives from its reservation-based casino to help it to better serve the tribal community.

Finally, proposed new Section (e)(3)(D) is completely objectionable. There is no reason that tribes within 200 miles of the Proposed Zone should have to approve. Market sizes differ from one region of the country to another depending, in part, upon factors such as population density and per capita income. Moreover, IGRA should not insulate tribes from ordinary economic competition from other tribes.

CONCLUSION

Each of the four exceptions to section 20's general prohibition against gaming on off-reservation lands is subject to procedural safeguards and substantive standards that prevent abuse of the process of qualifying for the right to conduct off-reservation gaming. There is no crisis in this area. Granted, a number of tribes are seeking to qualify for one or more of the exceptions, but all that is required is that the process for each such application be given a chance to work. We believe very strongly that tribes should be good, responsible neighbors and work with state and local governments to improve the quality of life for everyone, Indian and non-Indian alike. Nonetheless, non-Indian communities simply cannot be given veto power over the self-determination and economic development efforts of federally recognized Indian tribes, especially landless tribes that presently have no reservation.

It is not lost on the Greenville Rancheria that some of the most vocal critics of off-reservation gaming are Indian tribes with many of the most lucrative casinos in the United States. We applaud their wealth and success, and look to them as examples of how successful Indian economic development can be. Nonetheless, upon hearing their complaints, we cannot help but wonder why they do not support the right of their sister tribes to achieve the same goals that they have worked so long and hard to reach. We, too, want to rebuild our land base and provide health care and decent housing to our families and elders. We have the same desire to restore our language and renew our

culture. The concern they express about backlash from non-Indian communities strikes us as hypocritical, not to mention shortsighted. Federal Indian policy should not be dictated by non-Indian communities, and we find it cruelly ironic that some tribal governments are suggesting that the fears and prejudices of non-Indian communities should dictate the economic development opportunities available to landless tribes. We think they would not be so eager to be dictated to themselves by the state or local governments, but some how they believe that the interests of non-Indians should trump the ability of other tribes to pursue what they have. Have they become so rich and powerful that they have forgotten what it means to be Indian?

In conclusion, it is our belief that IGRA does not need to be amended with regard to off-reservation gaming because there is no genuine problem or crisis in this area. Those who most loudly call for amendment do so either because they do not understand the process, or because they want a guaranteed result in their favor and are not content to let the process established by Congress and implemented by the courts, Interior, and the NIGC work.

Witness:

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